BRIEF FOR PETITIONER IN SUPPORT OF THE PETITION FOR THE WRIT OF CERTIORARI.

Opinions Below.

The opinion of the Special Master appears at R. 69-112.

The opinion of the District Court appears at R. 123-124, and is not reported.

The opinion of the Circuit Court of Appeals for the Seventh Circuit appears at R. 129-138, and is not yet reported.

Jurisdiction.

The grounds upon which the jurisdiction of this Court is invoked are stated in the foregoing petition (p. 7, *supra*).

Statement of the Case.

The case is stated in the foregoing petition (pp. 2 to 6, *supra*).

Specification of Errors.

The errors intended to be urged are those specified in the petition under "Questions Presented" (p. 7, *supra*), the Court below having ruled adversely to petitioner or failed to rule upon the questions there stated.

Summary of Argument.

I.

THE STATE COURT JUDGMENT IS NOT CONCLUSIVE IN THE BANKRUPTCY COURT.

A. Section 77(j) applies only to claims arising prior to adjudication. Claims arising after the adjudication for personal injuries alleged to result from negligence in the operation of the railroad are administration expenses, governed by Section 62(a) of the Bankruptcy Act (11 U. S. C. 102).

B. If Section 77j applies to claims arising after adjudication, that Section does not negative the requirement of Section 77 c-7 (11 U. S. C. 205 c-7) that the bankruptcy court shall "fix * * * the manner in which such claims (*i. e.*, claims of creditors) may be filed or evidenced and allowed."

C. In view of Section 77(a), which gives the bankruptcy court "exclusive jurisdiction of the debtor", the debtor's estate is not bound by the state court judgment entered against the naked debtor corporation.

D. Section 66 of the Judicial Code (28 U. S. C. 125) does not apply to a proceeding under Section 77 of the Bankruptcy Act.

II.

THE DISTRICT COURT'S ORDER IS NOT APPEALABLE.

A. Section 24 of the Bankruptcy Act, as amended, retains the distinction between "controversies" and "proceeding" (*In re Winton Shirt Corp.*, 104 Fed. (2d) 777, 779, C. C. A. 3).

B. This is a controversy (*In Re Torgovnick*, 49 Fed. (2d) 211, C. C. A. 2; *Re Breyer Printing Co.*, 216 Fed. 878, 880, C. C. A. 7).

C. In a controversy, only a final order is appealable (Section 24 of the Bankruptcy Act, 11 U. S. C. 47).

D. The District Court's order is not final.

E. Even if this is a "proceeding", the District Court's order is not appealable because it is not "interlocutory" within the meaning of Section 24 of the Bankruptcy Act.

ARGUMENT.

I.

The State Court Judgment Is Not Conclusive in the Bankruptcy Court.

A. Section 77j applies only to claims arising prior to adjudication. Claims for personal injuries arising after the adjudication and allegedly due to negligent operation of the railroad are administrative expenses governed by Section 62(a) of the Bankruptcy Act (11 U. S. C. 102).

Section 77j is limited to "suits against the debtor." Only suits on causes of action arising prior to adjudication can be against the debtor. Causes of action arising subsequently are against the trustee or the debtor in possession. The proviso of Section 77j is no broader than the language it limits. The Court below held that the instant claim, which arose after the adjudication, is an "administrative expense" (R. 138). Claimant makes the same assertion (R. 4). Section 62(a) is applicable by virtue of Section 77(l). The language of Section 62(a) is clear and mandatory: Administrative expenses "shall * * * be * * * examined and approved or disapproved by the (bankruptcy) court."

B. If Section 77j applies to claims arising after adjudication, that section does not negative the requirement of Section 77 c-7 (11 U. S. C. 205 c-7) that the bankruptcy court shall "fix * * * the manner in which such claims (i. e., claims of creditors) may be filed or evidenced and allowed."

A judgment entered after adjudication is binding in neither liquidation bankruptcy (*In Re James A. Brady Foundry Co.*, 3 Fed. (2d) 437, C. C. A. 7) nor in corporate

reorganization (*In Re Paramount Publix Pictures Corp.*, 85 Fed. (2d) 42, C. C. A. 2). The question was expressly reserved by this Court in *Riehle* v. *Margolies*, 279 U. S. 218, 228. The bankruptcy court record must show where and how claims are being liquidated so that other creditors may, if they wish, contest claims (*In Re Paramount Publix Pictures Corp.*, 85 Fed. (2d) 42, 43-44, C. C. A. 2). The same requirement is made by Section 77 c-7. Section 77j does not negative that requirement. It provides only that if authorization and consent be sought in cases arising out of the operation of trains, etc., authorization and consent will be given. Cf. *Rodabaugh* v. *Denny*, 24 Fed. Supp. 1011 (D. C., N. Y.) where the claim arose before adjudication and where the bankruptcy court had expressly ordered that claims arising out of the operation of trains, etc., might be filed and prosecuted to judgment in any court of competent jurisdiction.

The decision of the Court below that the authorization and consent of the bankruptcy court were unnecessary is plainly contrary to the statute.

C. In view of Section 77(a), which gives the bankruptcy court "exclusive jurisdiction of the debtor", the debtor's estate is not bound by the state court judgment entered against the naked debtor corporation.

Section 77(a) provides that the bankruptcy court "shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor. * * *" The state court had no jurisdiction over the debtor corporation. The judgment entered against that corporation is void because of the state court's lack of jurisdiction. *McDonald* v. *Mabee*, 243 U. S. 90, 92. No matter what the Trustee did in the state court, he did not and could not confer on that court jurisdiction over the subject-matter.

D. Section 66 of the Judicial Code (28 U. S. C. 125) does not apply to a proceeding under Section 77 of the Bankruptcy Act.

Section 66 of the Judicial Code, providing for suits against a "receiver or manager of property" without leave of the court appointing him, relates to equity receiverships, and there appears to be no basis for extending the statute to trustees and debtors in possession in reorganization proceedings. The rights and liabilities of trustees and debtors in possession are covered by the Bankruptcy Act. Cf. *Anderson* v. *Scandrett*, 19 Fed. Supp. 681 (D. C., Minn.) and *In re James Butler Grocery Co.*, 12 Fed. Supp. 851 (D. C., N. Y.).

The public importance of a decision by this Court on the questions respecting the construction of Section 77 is manifest.

II.

The District Court's Order Is Not Appealable.

A. Section 24 of the Bankruptcy Act, as amended, retains the distinction between "controversies" and "proceedings."

The Court below stated the following as one of the "bases" of its holding:

> "The distinctions between 'proceedings in bankruptcy' and 'controversies arising in bankruptcy proceedings' as they originally existed in Section 24 of the Bankruptcy Act have been eliminated by the Chandler Act. *Dickinson Co.* v. *Cowan*, 309 U. S. 387. See also Senate Committee Report." (R. 138.)

In re Winton Shirt Corp., 104 Fed. (2d) 777 (C. C. A. 3), the Court said at page 779:

> "By the amendment (Section 24 of the Chandler Act) the troublesome distinction between 'contro-

> versies' and 'proceedings' existing under the prior statute has been eliminated except that it appears that appeals in controversies may be taken only from final orders, decrees, or judgments."

The distinction is preserved according to the authoritative text writers: Moore, Bankruptcy Manual, 1939, pages 88, 95-97; Remington on Bankruptcy, 4th Ed., Vol. 8, 1940, Supplement, Sec. 3704; Collier on Bankruptcy, 14th Ed., Vol. 2, pp. 734-5; Finletter on Bankruptcy Reorganization, 1939, pp. 609-610; Gerdes Corporate Reorganizations, 52 Harvard Law Review 1, 37. This Court should settle the conflict between circuits.

The case of *Dickinson Co.* v. *Cowan*, 309 U. S. 382, did not involve the questions here in issue. The question in that case was whether an order respecting compensation to a bondholders' committee in a corporate reorganization proceeding was appealable as of right or by permission of the reviewing court in view of Section 250 of the Chandler Act.

B. This is a "controversy."

The instant case is a contest between the Trustee and general creditors on the one hand and a third party on the other hand. It is not a dispute within the bankruptcy family. This case falls within the accepted definition of a "controversy" (*In re Torgovnick*, 49 Fed. (2d) 211, C. C. A. 2; *Re Breyer Printing Co.*, 216 Fed. 878, 880, C. C. A. 7). The decision of the Court below that this is a "proceeding" conflicts with the foregoing decisions.

This Court should settle the conflict between circuits.

C. In a "controversy", only a final order is appealable.

The language of Section 24 of the Bankruptcy Act manifests Congressional intent to change in some instances the mode of review, but not to enlarge the jurisdiction of the Courts of Appeals by authorizing appeals from interlocu-

tory orders in "controversies." The words "either interlocutory or final" in the statute clearly modify only the word "proceedings." The decision below plainly conflicts with the decision of the Court of Appeals for the Third Circuit in *In re Winton Shirt Corp.*, 104 Fed. (2d) 777, 779.

D. The District Court's order is not final.

The District Court's order, which neither rejects nor allows the claim, is not final. The statement of the Court below that the "decree (or order) of the District Court is a final decree, at least in part" (R. 138) is meaningless.

E. Even if this is a "proceeding", the District Court's order is not appealable because it is not "interlocutory" within the meaning of Section 24 of the Bankruptcy Act.

An order allowing a claim is in fact only "interlocutory." Section 57k (11 U. S. C. 93k) provides that at any time before the estate is closed an allowed claim may be reconsidered and "reallowed or rejected in whole or in part." Congress did not intend piecemeal review.

A decision by this Court on the construction of Section 24 of the Bankruptcy Act is of great public importance.

It is respectfully submitted that the prayer of the petition should be granted.

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